STATE OF MICHIGAN
IN THE SUPREME COURT

HELEN YONO,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.
_____/

Supreme Court No. 150364

Court of Appeals No. 308968

Court of Claims No. 11-000117-MD

150364
reply

MICHIGAN DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF

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INTRODUCTION

This case has sprouted several questions: Is a marked parallel-parking lane "designed for vehicular travel" under the highway exception to governmental immunity, MCL 691.1402? Does the definition of the statutory term "design" encompass more than just physical engineering or construction? And what is the appropriate standard under which courts evaluate a highway's designed purpose?

But one question that this case does not raise is whether this Court should overrule *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000). It should not. Quite to the contrary, MDOT is asking the Court to "reaffirm the principles of governmental immunity" stated in *Nawrocki* and *Grimes v Department of Transportation*, 475 Mich 72; 715 NW2d 275 (2006), in resolving this case. (MDOT's App for Leave at p 2.)

Yono insists that *Nawrocki* is dispositive. She is correct, to a degree; *Nawrocki* is controlling precedent. But it does not endorse the reasoning Yono employs or command the result she seeks. Rather, *Nawrocki* and *Grimes* confirm that the highway exception must be narrowly construed and applied. Doing so here compels a finding that the marked parallel-parking lane where Yono was allegedly injured was not designed for vehicular travel. Thus, because the alleged defect is not located within the improved portion of the highway designed for vehicular travel, Yono has not pleaded in avoidance of MDOT's governmental immunity, and her complaint should be dismissed.

ARGUMENT

MDOT applied for leave because the Court of Appeals' decision on remand was inconsistent with *Nawrocki* and *Grimes* and did not acknowledge all facets of highway design. Yono sidesteps these arguments. Instead, she first maintains that *Nawrocki* controls because both she and the *Nawrocki* plaintiff were pedestrians. Second, she suggests that MDOT has waived its challenge to the factual basis of her complaint.[1] Because neither assertion is accurate, nor responsive to MDOT's application, neither supports a denial of MDOT's application. The Court should grant MDOT's application and decide whether MDOT is liable for a defect in a marked parallel-parking lane.

I. *Nawrocki* did not hold that parallel-parking lanes are designed for vehicular travel.

Much of Yono's answer is spent reviving her argument that *Nawrocki* is dispositive, not because of its analysis of the scope of governmental immunity, but because both *Nawrocki* and this case involved a pedestrian. Yono further asserts that *Nawrocki* described the defect at hand as being located near the curb, similar to Yono's alleged defect. Thus, Yono concludes that because *Nawrocki* held that the plaintiff pleaded in avoidance of governmental immunity, *a fortiori*, so has she.

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[1] Yono also cites MCR 7.302 in an argument heading, but she never discusses that rule or the elements therein. The Court need not consider this challenge. See, e.g., *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (stating that a party cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims"). Furthermore, MDOT cited several of the MCR 7.302 factors in its application for leave. (MDOT's App for Leave at p 3.)

This flawed reasoning stems from the false premise that *Nawrocki* considered any aspect of highway design.

Nawrocki decided two points: (1) the highway exception protects pedestrians who are injured by a defect in the improved portion of the highway designed for vehicular travel; and (2) the exception does not permit claims for improper signage or other traffic-control devices. *Grimes*, 475 Mich at 79 n 21. In finding that the highway exception is available to pedestrians as well as vehicle occupants, *Nawrocki* relied on the statutory mandate that a highway must be maintained so that it is "reasonably safe and convenient for *public* travel." MCL 691.1402(1) (emphasis added). The Court distinguished "vehicular travel" from "public travel[,]" reasoning that "'public travel' encompasses *both* vehicular and pedestrian travel." *Nawrocki*, 463 Mich at 171-172.

MDOT is not challenging the definition of "public travel." Nor is it using Yono's pedestrian status as a defense. Rather, MDOT asserts that a marked parallel-parking lane is not part of the "improved portion of the highway designed for vehicular travel." MCL 691.1402(1). This is a separate inquiry that *Nawrocki* did not address or decide—a point that Justices Markman and McCormack brought up during the mini-argument on MDOT's application in *Yono I*. (1/16/14 Oral Argument at 29:27-30:44.)

Further, Yono relies on a single footnote to support her reading of *Nawrocki*. (Yono's Ans at p 5.) This footnote acknowledges that some incongruities may result from strictly applying the highway exception's plain text. *Nawrocki*, 463 Mich at

172 n 27. This dicta simply confirms that there may be seemingly little practical difference, but significant legal difference, in a pedestrian encountering a defect in a crosswalk as opposed to a travel lane. In short, this footnote endorses a strict reading and narrow construction of the highway exception, regardless of the effects of doing so.

Yono hones in on the footnote's description of the roadbed to which the highway exception applies as that "used by" vehicular traffic. But under the statute's plain text, a governmental agency's duty of repair extends only to "the improved portion of the highway *designed for* vehicular travel[.]" MCL 691.1402(1) (emphasis added). This Court "will not elevate dicta above the plain language of a statute." *Renny v Dep't of Transp*, 478 Mich 490, 527 n 36; 732 NW2d 518 (2007).

Moreover, *Nawrocki* was decided before *Grimes*, which confirmed that not every portion of the highway physically capable of accommodating vehicles—or, per the footnote, the portion "used by" vehicles—is *designed* for vehicular travel. "That vehicular traffic might *use* an improved portion of the highway does not mean that that portion was 'designed for vehicular travel.'" *Grimes*, 475 Mich at 90. To the extent that this footnote may have been relevant to *Nawrocki*'s holding, it is no longer authoritative in light of *Grimes*.

Nawrocki's holding that the highway exception is available to pedestrians remains good law and is not under attack here. It is *Nawrocki*'s second holding—that the highway exception is limited to defects in "the actual roadbed, paved or unpaved, designed for vehicular travel"—that, combined with *Grimes*, requires a

finding that Yono did not identify sufficient facts to avoid governmental immunity. *Nawrocki*, 463 Mich at 152.

II. Yono's procedural arguments are inapposite and do not address the merits of MDOT's application.

Aside from her continued statements of reliance on *Nawrocki*, Yono does not substantively respond to MDOT's application. Rather, she volleys a variety of procedural challenges, none of which are compelling.

First, Yono suggests that MDOT "chose the [MCR 2.116](C)(8) route," for its motion for summary disposition under 2.116(C)(7), somehow precluding any factual challenge to Yono's complaint. But she is overlooking the affidavit that MDOT filed to support its motion for summary disposition. Had MDOT facially attacked the pleadings under 2.116(C)(8), it could not have included evidence outside the pleadings. See MCR 2.116(G)(5) ("Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)."); see also *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994) (distinguishing (C)(7) motions from (C)(8) motions).

As the Court of Appeals acknowledged, "a party moving for summary disposition under MCR 2.116(C)(7) is not limited to challenging the facial validity of the pleadings." Slip Op. at 4.[2] Hence, MDOT's supporting affidavit is properly considered in deciding whether a genuine issue of material fact exists as to the intended design of the marked parallel-parking lanes. See *id.* ("Such a challenge is

[2] Indeed, MDOT does not dispute that Yono's complaint facially invoked the highway exception.

similar to one under MCR 2.116(C)(10)"); see also MCR 2.116(G)(5) (a court "must" consider affidavits and other documentary evidence on a (C)(7) motion).

Relatedly, Yono contends that MDOT did not preserve a factual challenge as to design, thereby waiving its ability to present one now. This is likewise incorrect. MDOT has consistently maintained that the marked parallel-parking lane was not designed for vehicular travel as contemplated by *Grimes*. MDOT has relied on Gary Neimi's affidavit throughout these proceedings to rebut the factual allegations in Yono's complaint. Although MDOT has tailored its arguments to respond to this Court's remand order and to challenge the Court of Appeals' decision on remand, including the court's constrained view of highway design, its core argument has remained static.

Finally, Yono protests that no discovery has taken place. This issue *is* waived. If a party believes discovery is necessary to resolve a factual dispute, "the party must at least assert that such a dispute does indeed exist and support the allegation by some independent evidence, even if hearsay." *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). Yono did not advise the trial court that discovery was necessary to decide the immunity question. Instead, she engaged her own expert and filed a competing affidavit. She cannot now claim that discovery is necessary to resolve the design question.

Thus, the proper inquiry is whether Yono has rebutted MDOT's motion for summary disposition by identifying a genuine issue of material fact as to whether the marked parallel-parking lane was designed—considering both material and

geometric design—for vehicular travel, and not whether Yono is entitled to after-the-fact discovery. As discussed in MDOT's application, Yono's conclusory affidavit, from an affiant with no stated design experience and who referenced no design standards, fails to meet this burden. Summary disposition should therefore have been granted in MDOT's favor.

CONCLUSION AND RELIEF REQUESTED

Yono's answer is largely unresponsive to MDOT's application. She provides no compelling reason to deny MDOT's application, nor does she defend the Court of Appeals' departure from *Nawrocki* and *Grimes*. And Yono does not even attempt to defend the Court of Appeals' analysis that restricted the meaning of the term "designed" to mean "engineered," instead of "intended," thereby extending the State's liability beyond what the Legislature intended.

Accordingly, MDOT requests that the Court grant leave to decide whether the marked parallel-parking lane falls outside the "improved portion of the highway

designed for vehicular travel," or, alternatively, vacate the Court of Appeals decision and remand the case to the Court of Claims for further proceedings.

Respectfully submitted,

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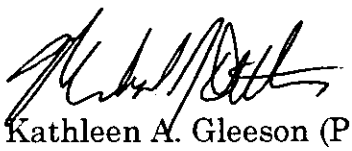

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